Supreme Court, U.S.
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No. 01-1547

In the

Supreme Court of the United States

SOUTH CAMDEN CITIZENS IN ACTION,
Petitioners,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.
Respondents,

ST. LAWRENCE CEMENT CO., L.L.C.
Intervenor-Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Third Circuit correct in holding that the power to create a federal right enforceable under 42 U.S.C. §1983 belongs with Congress, and that federal regulations may further define a right created by statute but may not, by themselves, create such a right?

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STATEMENT OF THE CASE

On February 14, 2001, the Plaintiffs filed in the United States District Court, District of New Jersey, a Verified Complaint for Declaratory Judgment and Injunctive Relief alleging, in relevant part, that the Defendants, the New Jersey Department of Environmental Protection (NJDEP) and its Commissioner, violated Title VI of the Civil Rights Act of 1964, §42 U.S.C. 2000d *et seq*., by issuing air pollution control permits to the Intervenor, St. Lawrence Cement Co. The Plaintiffs alleged that operation of St. Lawrence's slag grinding facility in South Camden would have a discriminatory effect upon them in violation of regulations at 40 C.F.R., Part 7, of the United States Environmental Protection Agency ("EPA"), promulgated under Section 602 of Title VI, §42 U.S.C. 2000d-1 ("§602").

The Complaint requested, in relevant part, that the Court (1) order the Defendants to rescind the permits, (2) enjoin operation of the facility, (3) declare both that the Defendants had violated Title VI and that the permits were invalid, (4) enjoin NJDEP from using its current procedures in evaluating other permit applications, and (5) order the NJDEP to adopt new permit application procedures in order to prevent alleged discriminatory effects in future permitting decisions. The Plaintiffs also simultaneously filed an Order to Show Cause seeking a preliminary injunction rescinding the permits, and an injunction prohibiting NJDEP from taking any action to authorize operation of the facility.

The parties submitted documentary evidence and briefs on the preliminary injunction request contained in the Order to Show Cause. Based on this information, the District Court issued a preliminary injunction vacating the St. Lawrence permits. The District Court also issued a "declaratory judgment" that the Defendants had violated Title VI by failing to conduct an adverse disparate impact analysis regarding the

effects of the facility on the local area. Although not requested by the plaintiffs in their application, the District Court ordered the Defendants to do an adverse disparate impact analysis of the St. Lawrence facility, and defined the factors that Defendants were required to review in that analysis.

In opposition to the preliminary injunction, Defendants noted that the St. Lawrence permit was consistent with the National Ambient Air Quality standards (NAAQs) that had been promulgated by the EPA. Because those standards were derived by the federal government from health-based criteria, the State's position was that the impact of the facility was, as a matter of law, not "adverse." In addition, because the NAAQs had been duly promulgated as regulations, New Jersey maintained that it was not empowered to ignore those standards in place of the general provisions set forth in 40 C.F.R. §7.35.

Nonetheless, the District Court enjoined operation of the facility and ordered NJDEP to conduct a disparate impact analysis that included factors, such as fine particulate emissions, that are not yet included in EPA's regulations. *See American Trucking Assoc. v. E.P.A.,* 175 F.3d 1027 (D.C. Cir. 1999), *aff'd in part, rev'd in part, Whitman v. American Trucking Assoc.*, 121 S.Ct. 903 (2001). The Court also ordered DEP to review factors, such as the impact of off-site mobile sources of air pollution, that DEP is precluded by EPA regulations from considering in permitting stationary sources. *See* 40 C.F.R. §51.165(viii).

The District Court's injunction was issued on April 19, 2001. On April 24, 2001, this Court decided in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that no private right of action existed to enforce §602. Plaintiffs immediately moved to amend their complaint to add a cause of action under 42 U.S.C. §1983. Additional briefing was ordered, with the District Court reissuing its decision on May 10, 2001, finding a viable cause of action under 42 U.S.C. §1983 and an enforceable federal right in 40 C.F.R. §7.35.

The Third Circuit reversed. The Court relied on the holding in *Sandoval* that §602 did not create rights but only authorized agencies to promulgate rules to effectuate the ban on intentional discrimination set forth in §601. 40a-41a. The Court also relied on this Court's statement in *Sandoval*, that "language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not," 532 U.S. at 291, and concluded that 40 C.F.R.§7.35 could not create a right enforceable under 42 U.S.C. §1983 to be free from disparate impact discrimination. The Court stated,

> It is plain that in view of the pervasiveness of state and local licensing provisions and the likely applicability of Title VI to the agencies involved, the district court's opinion has the potential, if followed elsewhere, to subject vast aspects of commercial activities to disparate impact analyses by the relevant agencies....While we do not express an opinion on whether that would be desirable, we do suggest that if it is to happen, then Congress and not a court should say so as a court's authority is to interpret rather than to make the law. 41a-42a.

Since the issuance of the Third Circuit's decision, the NJDEP has moved forward to address disparate impacts in implementing environmental programs. NJDEP is considering regulations to establish a means of integrating such concerns into environmental program decisionmaking. While no final regulations have been adopted, the Department anticipates developing a mechanism that will allow concerns such as those being raised by plaintiffs to be considered by the State and addressed early on. Any such mechanism will be developed with the benefit of public comment and notice, so that the regulated community knows what measures must be taken. Defendants maintain that it is this type of process, rather than a judicial usurpation of legislative and executive authority, that

was contemplated by the Third Circuit, and by this Court in *Sandoval*.

ARGUMENT

In *Alexander v. Sandoval, supra*, 532 U.S. 275, this Court sent a clear message that the language and intent of Congress is essential to determine the existence of a private right of action to enforce Title VI regulations. The Court below heeded this message, declining to turn the decision in *Sandoval* into "something of a sport," *id.* at 300, by allowing plaintiffs simply to add a claim under 42 U.S.C. §1983 to avoid its ruling. Instead, the Court correctly applied *Sandoval* to hold that while administrative regulations may help define a federal right created by Congress in a statute, they cannot, by themselves, create a right enforceable in a §1983 action. This result is the logical and correct application of the holding in *Sandoval*, and is fully consistent with prior decisions of this Court. Review of this decision is therefore not required to clarify the law in this area.

There is also no disagreement among the Courts of Appeals that requires the intervention of this Court. The decision below is the only Circuit Court decision after *Sandoval* to decide the precise issue in this case, *i.e.,* whether disparate impact regulations promulgated pursuant to Title VI create a federal right enforceable under 42 U.S.C. §1983. The broader issue addressed by the Third Circuit, *i.e.,* whether regulations may create an enforceable federal right not supported by the underlying statute, has also been addressed by the Eleventh Circuit since *Sandoval*, with that Court reaching the same result. Prior to *Sandoval*, all but one Circuit had reached the same conclusion on the broader issue. The Sixth Circuit, the only one that ruled otherwise, has not revisited the issue since *Sandoval*. Thus, further guidance from the Court is not required and the petition for a writ of *certiorari* should be denied.

I. THE THIRD CIRCUIT'S RULING THAT THE EPA REGULATIONS DO NOT CREATE A FEDERAL "RIGHT" TO A DISPARATE IMPACT ANALYSIS ENFORCEABLE PURSUANT TO 42 U.S.C. §1983, IS A LOGICAL AND CORRECT APPLICATION OF THIS COURT'S DECISION IN *ALEXANDER V. SANDOVAL*

Section 602 of Title VI, 42 U.S.C. §2000d-1, authorizes federal agencies to issue "rules, regulations, or orders of general applicability" in order to "effectuate" the provisions of §601. Section 601 prohibits any program or activity receiving federal funds from excluding, denying benefits or discriminating against persons on the basis of race, color or national origin. 42 U.S.C. §2000d. Section 601 has been interpreted as prohibiting intentional discrimination, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and has been found to create a private right of action. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

In *Alexander v. Sandoval, supra*, the Supreme Court specifically found that regulations promulgated pursuant to §602 of Title VI do not create a private right of action. *Id.* The regulations at issue in *Sandoval* were not solely aimed at intentional discrimination but also at programs alleged to have a disparate impact. Specifically, the regulations forbid funding recipients from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 532 U.S. at 278. This language is identical to the prohibition in 40 C.F.R. §7.35(b) that gives rise to this case.

In *Sandoval,* the Court concluded that to the extent regulations promulgated under §602 were aimed at intentional

discrimination, they were enforceable under the same private right of action found under §601. The Court explained: "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284. However, the Court also held that "disparate impact regulations do not simply apply §601 -- since they indeed forbid conduct that §601 permits - and therefore [it is] clear that the private right of action to enforce §601 does not include a private right to enforce these regulations." *Id.* at 285. The Court observed:

> Like substantive law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute. [*Id.* at 286-87 (citations omitted)]

Reviewing the text of §602, the Court noted that the "rights creating" language found in §601 was missing. *Id.* at 288. The Court also found that the methods set forth in the statute for enforcing §602 regulations suggested a Congressional intent *not* to permit private enforcement, as "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 290. Having found that §602 itself did not include any evidence of Congressional intent to create a private right of action, the Court held that the regulations promulgated pursuant to §602 also could not create such a right. The Court stated, "it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* at 291.

Relying on *Sandoval*, the Third Circuit held in this case that while regulations that provide an "authoritative interpretation" of a statute may be construed in conjunction with the underlying statute to define an enforceable right, it is Congress that may create such rights, not the implementing agency. *Id.* Although proof of specific congressional intent to preserve a §1983 cause of action is not necessary to establish a right enforceable under §1983, *see Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985), Congressional intent to create a federal "right" is necessary, and, as the Supreme Court explained in *Sandoval*, is not present here.

This ruling is both correct an unremarkable. This Court has stated clearly that the Constitution vests sole legislative power in Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Executive executes the laws created by Congress, and may fill interstices in the statutory language if necessary to resolve any ambiguity. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Thus, the Executive, through regulations, may help define rights that have been created by Congress, but it cannot create such rights because doing so is a legislative act.

This decision is fully consistent with this Court's decisions in *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987) and *Blessing v. Freestone*, 520 U.S. 329 (1997). In *Wright* the Court held that the regulation was "entitled to deference as a valid interpretation of the statute," and based its holding on its view that "the benefits *Congress* intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and §1983...." *Id.* at 430-432 (emphasis added). *See also Suter v. Artist M,* 503 U.S. 347, 357 (1992) (noting that in *Wright* and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), the Court " took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created enforceable rights, privileges, or

immunities within the meaning of § 1983"). Similarly, *Blessing* focused on Congress' intent and the statutory language in determining whether a right enforceable under §1983 was created. *Blessing, supra*, 520 U.S. at 340-341.

This view is also consistent with this Court's decisions in *Chevron* and *Chrysler Corp. v. Brown*, 441 U.S. 281(1979). In *Chevron*, the Court was careful to delineate the difference between legislative and executive power. The Court stressed that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. 842-3. In *Chrysler*, the Court unambiguously stated that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." 441 U.S. at 302.

Plaintiffs argue that it is irrelevant whether the right in question was created by Congress as long as it has the "force of law," and meets the three-part test of *Blessing v. Freestone*. However, this has never been the rule. Since *Maine v. Thiboutot*, 448 U.S. 1 (1980) the Courts have always focused on whether the statute at issue in a particular case gives rise to a federal "right" enforceable under 42 U.S.C. §1983. As discussed below, only the Sixth Circuit has relied on regulations alone, *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994), although that case did not involve the unusual situation we have here, where the Court has specifically found that the regulations exceed the scope of the underlying statute. *See Sandoval, supra,* 532 U.S. at 285.

Here, the Supreme Court has stated specifically that §601 addresses only intentional discrimination and that §602 contains no rights-creating language. To support a federal right to enforce a disparate impact claim, therefore, plaintiffs must rely solely on an EPA regulation. Moreover, they must rely on

that executive provision to the extent it admittedly exceeds the scope of the legislative enactment. The Third Circuit's determination that the EPA cannot create rights in this manner is an obvious result, given basic principles governing the separation of powers.

Although plaintiffs spend much of their petition attempting to reargue *Sandoval*, the Third Circuit's ruling was also a logical result of that decision. There is no need to grant the petition to reaffirm *Sandoval*, nor does the decision below suggest that further guidance by this Court on these issues is necessary. The petition should therefore be denied.

II. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL

The Third Circuit's conclusion that Title VI disparate impact regulations do not create a federal right enforceable under §1983 is not only a natural one given this Court's decision in *Sandoval*, it is consistent with the decisions of every other circuit court that has addressed the issue. There is also no split in the circuit courts regarding the Third Circuit's broader conclusion that federal rights enforceable under 42 U.S.C. §1983 must be created by Congress. Thus, Plaintiffs are incorrect in stating a disagreement among the circuit courts exists that requires this Court's guidance.

Since *Sandoval*, the Third Circuit is the only federal appellate court to address whether Title VI disparate impact regulations create a federal right enforceable under §1983. Two District Courts have addressed the issue, reaching the same result. In *Ceaser v. Pataki*, 2002 WL 472271 (S.D. N.Y. 2002), the Court relied on the decision in this case to find that disparate impact regulations promulgated pursuant to Title VI were not enforceable under §1983. The Court found that "no other result is consonant with separation of powers, for if Congress intended that only certain specific statutory provisions give rise to private enforcement actions under §1983,... it cannot have intended that private actions be predicated on administrative regulations not closely connected to these statutory sources of private power." *Id.* at *3 (quoting *Graus v. Kaladjian*, 2 F.Supp. 2d at 543). In *Bonnie L. v. Hadsock*, 180 F.Supp. 2d 1321 (S.D. Fla 2001) the Court concluded that "the *Sandoval* majority's analysis, in the opinion of this Court, precludes the enforcement of disparate impact regulations under §1983 ..." because "Congressional intent is determinative on

whether a private right and private remedy exists." *Id.* at 1343-4.

Prior to the decision in *Sandoval*, five of six circuits had reached the same conclusion as the Court below when presented with the question of whether regulations alone can create a federal right enforceable under §1983. As plaintiffs acknowledge, the Fourth and Eleventh Circuits held that federal regulations could not create a right enforceable under §1983 unless that right was inferable from the underlying statute. *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987); *Harris v. James*, 127 F.3d 993 (11th Cir. 1997). Plaintiffs are incorrect, however, in their assertion that the Ninth and District of Columbia Circuits held otherwise. In *Buckley v. City of Redding*, 66 F.3d 188, 190 (9th Cir. 1995) the Court described the issue before it as "whether the *statute* and its interpretive regulations create an enforceable federal *statutory* right." (Emphasis added). In finding a §1983 cause of action, the Court concluded that "the *Act* unambiguously creates an enforceable right." *Id.* at 192. Similarly, in *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985) the Court specifically referred to the claims at issue as "*statutory* section 1983 claims," and concluded that alleged violations of "*both* the [Housing] Act and HUD's grievance procedure regulations" could be enforced by a §1983 action.

Since this Court's decision in *Sandoval,* the Eleventh Circuit has reaffirmed its holding that "if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provisions, we think the regulation is too far removed from Congressional intent to constitute a 'federal right' enforceable under §1983." *Kissimee River Valley Sportsman Assoc. v. City of Lakeland*, 250 F.3d 1324 (11th Cir. 2001)(quoting *Harris v. James*, *supra*,127 F.3d at1009). The Fifth Circuit has stated that the "overriding question" in these cases was "whether Congress intended to create a federal right enforceable through §1983,"

and that in analyzing this question, "the existence of specific HUD regulations should not be relevant." *Banks v. Dallas Housing Authority*, 271 F.3d 605, 610 n.4 (5th Cir. 2001).

The only variance from this view is in the District Courts within the Sixth Circuit. As noted earlier, in *Loschiavo v. City of Dearborn*, *supra*, 33 F.3d 548, the Sixth Circuit ruled that the regulations at issue in that case did create a right enforceable under §1983. The Court did so, however, in a context unlike the situation here, where a finding has already been made that the regulations exceed the scope of the statute. *Id.* at 551. In *Loschiavo*, the Court's discussion does suggest that the regulation at issue was viewed as consistent with the statutory provisions and goals. *Id.* While several District Courts within the Sixth Circuit have viewed view *Loschiavo* as holding that regulations alone may create federally enforceable rights, *see Lucero v. Detroit Public Schools*, 160 F.Supp.2d 767 (E.D. Mich. 2001); *White v. Engler*, 188 F. Supp.2d 730 (E.D. Mich. 2001), the Sixth Circuit has not yet revisited the issue post-*Sandoval*. Surely before a "split in the circuits" can be declared, it would need to be determined whether the one Circuit that has taken a different view would be affected by this Court's decision in *Sandoval*.

Accordingly, there is no evidence that the lower federal courts have misinterpreted the decision in *Sandoval* or have reached divergent results. As the lower courts have not interpreted the *Sandoval* decision as "something of a sport," the intervention of this Court is not required.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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